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Supreme Court, U.S.
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No. 08-204

In the Supreme Court of the United States

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE
Respondents.

ON PETITION FOR WRIT OF *CERTIORIARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1) Since 80% of stalking victims are women, should a disparate impact theory of discrimination be applied to find that workplace/campus stalking constitutes sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964?

2) Where a woman is sexually harassed in her workplace by a non-employee, what "magic words" must she use in order to be protected from retaliation, as guided by EEOC Regulation 29 CFR § 1604.11(e)?

3) Must a plaintiff prove that she was "groped" or "touched" to prevail on a claim of sexual harassment?

4) Is harassment "based on sex" when the harasser uses gender-specific language, referring to the victim as his "*wife*?"

5) Where a stalker selects his *female* victim because she fits the "profile" of a fictitious *female* character, is the harassment "gender profiling," using a "sex-plus" analysis?

6) Where an employer cancels an advertised job vacancy, and leaves additional vacancies unfilled to avoid consideration of an applicant/employee who has complained of sexual harassment, does this conduct constitute actionable retaliation under Title VII, as defined by *Burlington Northern v. White*, 548 U.S. 53 (2006)?

7) Can a defendant escape liability in a Title VII retaliation case by admitting to *age discrimination* in its closing argument, without subjecting itself to a

claim under the Age Discrimination in Employment Act (ADEA)?

8) Under what circumstances should the court order a Title VII plaintiff to pay the litigation costs of the defendant?

9) Can a magistrate judge, *sua sponte*, dismiss a previously upheld claim where the Defendant never challenged the validity of that claim, as a matter of law?

10) Can the tort of "wrongful termination," in violation of public policy, be applied where an employee is terminated for reporting stalking in the workplace?

11) Can a plaintiff establish a claim of intentional infliction of emotional distress where an employer subjects her to a workplace stalker, lies about its efforts to ban the stalker from the workplace, and retaliates against the stalked employee by terminating her employment?

12) May a court place a decision on a plaintiff's motion for mandatory Rule 37 sanctions – in excess of $364,000 -- in indefinite abeyance and close the case without deciding it?

13) Where the court publishes a decision that relies on testimony that it ordered *excluded*, and that disputed testimony is harmful to plaintiff's professional reputation, may the court deny the plaintiff's *unopposed* motion to vacate it?

14) Does a court violate due process, the law of the case and/or Rule 56(d)(1) where it established facts and identified jury questions pre-trial, but post-trial, submitted a previously decided material question of fact to the jury?

15) Does a judge unduly prejudice a jury against a *pro se* party, by ordering her to talk to herself on the witness stand and speak of herself in the third-person, particularly where the court has excluded admissible evidence that would have enhanced her credibility?

16) Does perjury constitute a "fraud" upon the court and require vacating a jury verdict, pursuant to Rule 60(b)(2)?

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ARGUMENT

I. Rule 44 Standard for Rehearing

Petitioner respectfully requests rehearing on her *Petition for Writ of Certiorari*, which was denied on November 17, 2008. Pursuant to Rule 44, this *Petition for Rehearing* is limited to arguments based on intervening circumstances of substantial and controlling effect and to other substantial grounds not previously presented.

A new controlling Supreme Court decision presents an intervening circumstance justifying the grant of a rehearing. *See Zap v. United States,* 330 U. S. 800 (1947); *Bradley Mining Co., v. Boice,* 345 U. S. 932 (1953); *West v. Northwest Airlines, Inc.,* 505 U.S. 1201 (1992); and *Friend v. United States,* 517 U. S. 1152 (1996). The interest in finality of litigation must yield where the interests of justice would make the strict application of the rules unfair. *United States v. Ohio Power Company,* 353 U.S. 98, 99 (1957).

II. *Crawford v. Nashville* Constitutes an "Intervening Circumstance of Substantial and Controlling Effect" on *Martin*

This Court's forthcoming decision in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted* by 128 S. Ct. 1118 (No. 06-1595) is an intervening circumstance of substantial and controlling effect in *Martin*. *Crawford is* another case similarly alleging sexual harassment and retaliation for reporting sexual harassment. Crawford requires that this Court further define "protected activity," within the meaning of Title VII of the Civil Rights Act of 1964.

The forthcoming decision in *Crawford* would

constitute controlling law in *Martin*, with respect to: 1) whether the question of "protected activity" is properly decided by a Court, as a matter of law, or submitted to a jury, as an issue of fact; and 2) the manner in which sexual harassment must be reported in order to constitute "protected activity."

Both Ms. Crawford and Prof. Martin reported their harassers' specific conduct to their employers. Ms. Crawford reported it during an internal investigation, in response to questions about whether a supervisor engaged in "inappropriate conduct." Prof. *Martin* complained verbally and wrote memoranda to her supervisor, then Law School Dean Alice Gresham Bullock. She entitled her memos "Security Problem on Campus," and referred to Harrison as a "stalker" after he was so characterized by the D.C. Metropolitan Police Department.

In both *Crawford* and *Martin*, the respective Circuit Courts held that the plaintiffs did not engage in "protected activity" because of *how* they reported the sexual harassment to their employers. Both Ms. Crawford and Prof. Martin lost their jobs shortly after reporting the harassment to their employers.

Ms. Crawford was terminated from her job after thirty years of employment. Despite student protests praising Prof. Martin's teaching ability and dedication to students, Howard refused to renew her teaching contract and left at least three faculty vacancies unfilled. Prof. Martin's previously glowing professional reputation was thereby tarnished in academia and elsewhere in the legal profession. This "non-renewal," the year before she would have been eligible for tenure, ended her career as a law professor and precluded her from returning to a position comparable to those she held during her

prestigious seventeen year legal career prior to being stalked.[1]

Both Ms. Crawford and Prof. Martin were deprived of the opportunity to prove that they lost their jobs due to retaliation for reporting the harassment. In Ms. Crawford's case, she was deprived of this opportunity at the summary judgment stage, based on the court's definition of "protected activity." In Prof. Martin's case, she was deprived of this opportunity at trial, where the court submitted the question of "protected activity" to a jury and failed to provide proper instruction on the legal analysis necessary to determine the issue.

A. *Crawford* will Determine whether the Trial Judge in *Martin* Erroneously Submitted the Question of "Legally Protected Activity" to a Jury

In 2006, when *Martin* finally went to trial, the jury determined that: 1) Harrison's harassment of Prof. Martin was severe and pervasive, creating a hostile work environment for her; 2) Harrison's conduct was unwelcome; 3) Howard administrators

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[1] Dawn Martin was a law professor at Howard University from July 1996 through June 1998 and at Cleveland State University from 1994-1996. She taught Equal Employment Opportunity (EEO) law and other courses for four years. Prior to teaching, she served as: 1) a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program); 2) the New York State Office of the Attorney General, Civil Rights Bureau; 3) Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC), helping to develop national policy; and 4) Assistant General Counsel for the D.C. Police Department. Prof. Martin published articles in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

knew that Prof. Martin was being stalked by Harrison in her workplace; and 4) Howard failed to take reasonable steps to end the harassment -- or eliminate the hostile work environment. Jury Verdict, A-127; Pet. 10.

Based on the jury's factual findings, Ms. Martin was entitled to judgment, as a matter of law; however, Judge Hogan improperly charged the jury with the determining what conduct constitutes "protected activity"[2] (*see* Pet. at 19-20; A-129); however, the question of whether specific conduct constitutes "legally protected activity" is one of law for the courts – not a question of fact for the jury. *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994); *EEOC v. PVNF, LLC*, 487 F.3d 790, 803-804 (10th Cir. 2007).

In *Crawford*, the lower courts decided the question of whether specific conduct constitutes "protected activity." No one appears to be arguing that this is a jury question; accordingly, this Court's forthcoming decision will presumably hold -- either expressly or implicitly -- that the question of whether conduct constitutes "protective activity" is a question for the courts -- not a jury. This decision will constitute controlling case law requiring reversal in *Martin*, since plaintiff lost the case only because the trial court submitted this question of law to the jury.

Howard repeatedly told the jury that Ms. Martin's claim must be defeated because she entitled her memos "Security Problem on Campus" rather than "Sexual Harassment;" yet, courts have long

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[2] As a part of that determination, he also charged the jury with determining whether Harrison's conduct constituted harassment on the basis of sex. (*See* A-127; Pet. 14-19)

recognized that stalking is one of the most egregious forms of sexual harassment.[3] Jurors should have been instructed that it is not necessary for a plaintiff to use the precise words "sexual harassment" to sustain her claim. Judge Hogan flatly refused to provide that instruction. Without the proper legal framework for analyzing harassment based on sex, jurors were confused into accepting Howard University's argument that the stalker's harassment was not sexual in nature or based on sex. The D.C. Circuit Court affirmed, without discussion of the applicable law. Those legal arguments compel reversal. Pet. at 19-23.

Crawford and *Martin* address different sides of the same coin, so to speak, with respect to reporting sexual harassment. In *Crawford*, the harasser was a supervisor. Ms. Crawford did not initiate a charge against this harasser supervisor, but rather, responded to an employer inquiry, during an internal investigation, when she was questioned about whether she witnessed this supervisor engage in "inappropriate conduct." In *Martin*, the harasser was a non-employee. The question is whether her requests for protection from this serial campus stalker constituted "protected activity."

B. *Crawford* will Determine whether "Magic Words" Must be Uttered to Invoke Title VII Protection against Retaliation

In *Crawford*, both sides agreed that no "magic words" are necessary to qualify it as "protected activity" when reporting conduct that constitutes sexual harassment. Tr. Oral Argument at 17, 29. Both the Solicitor General of the United States,

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[3] *See* Pet. at 21, fn. 18.

Amicus supporting Ms. Crawford, and Respondent agreed that the standard to be used is whether a reasonable person would infer that the employee opposes a practice made unlawful by the statute. *Id.*

Prof. Martin complained about a serial campus stalker, Leonard Harrison, who was roaming Howard Law School's buildings and other campuses, pursuing Prof. Martin and other African-American *female* professors to be his "wife." She attached copies of Harrison's handwritten letters to her and a transcript of his voicemail messages so stating. Harrison's letters included his confession that he had pursued numerous other women, in addition to her, searching for the physical embodiment of a fictional character in a book, written by renowned Prof. Derrick Bell. Harrison stated that he believed that the woman who served as the model for this fictional character was meant to be his "natural wife."

Under the standard advocated by both sides in *Crawford*, Prof. Martin's reports of stalking constitute "protected activity." The undisputed evidence demonstrated not only that a reasonable person *would* understand that Harrison's harassment was sexual in nature and/or based on her gender, but that the people she told *did, in fact,* understand it.

On November 20th and 21,st *all* persons whom she told about Harrison's stalking readily recognized that the Harrison was stalking her as a woman. These people included Howard administrators,[4] colleagues,[5] staff members[6] and law enforcement

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[4] Pl's Tr. Exhibit 8B (**JA**14,407); Tr. #490 at 50:5-51:4 (**JA**12,521-12,522).

[5] Tr. 1666:2-15 (**JA**12,460); Prof. Taslitz' comment that Prof. Martin would be "*raped* and killed" by Harrison if the

officers.[7] Indeed, in her July 1, 1999 to Howard's General Counsel, Dean Bullock admitted that she understood that Harrison was targeting *women* to "stalk" and "otherwise harass." (A-196)[8]

In 1999, Judge Hogan also understood. He held: *"it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female"* and that *Harrison "targeted women other than Plaintiff."* 1999 U.S. Dist. LEXIS 19516 at *11-12, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (A-27). Rule 56(d)(1) required that this factual determination remain *"established through the action"* -- not re-litigated by a jury.

Seven years later, however, *after the trial*, Judge Hogan *abandoned* his own 1999 holding and submitted the question to the jury; moreover, he refused both the jury's and Ms. Martin's requests for more specific jury instructions on the definition of "sexual harassment" and harassment based on sex.

In 1999, Judge Hogan held: "There are no 'magic words' which must be chanted in order to invoke Title VII protection, *citing EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983). (A-28) He used examples of "protected activity" from *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992). *Powell* held that the plaintiff had engaged in "protected activity" when she told her employer simply, "I don't have to

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matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9 (**JA**12,518)

[6]Bruner depo at 137:4-13 (**JA**6,808).

[7]Sirleaf depo at 36:22-37:3 (**JA**6,658), 137:5-140:19 (**JA**6,698), 21:22-22:5 (**JA**6,652), 99:22-102:3 (**JA**6,683).

[8]Dean Bullock's trial testimony to the contrary constitutes perjury. See Pet. at 28; Reply Brief at 8-9.

take this" where her employer observed customer behavior that he should have recognized as sexual harassment. (A-28) Judge Hogan adopted *Powell*'s holding that a simple request to the employer to "do something" was enough to invoke Title VII. Similarly, Justice Stevens indicated that "get the hell out of my office" would be a sufficient response to sexual harassment to constitute an opposition to it. Tr. Oral Argument in Crawford, at 36. In 2006, however, Judge Hogan refused to instruct the jury that an employee is not required to use the words "sexual harassment" to invoke Title VII protection, thereby rendering his own 1999 meaningless.

If *Martin* is considered as a companion case to *Crawford,* or supplements *Crawford*, this Court would provide lower courts with a more comprehensive, or refined definition of "protected activity," whether the harasser is an employee or a non-employee in the workplace.

C. *Martin* would Supplement the *Crawford* Analysis by Addressing "Protected Activity" where the Harasser is a Non-Employee in the Workplace

In 1999, *Martin* set precedent in the D.C. Circuit, when district court adopted the Regulation of the U.S. Equal Employment Opportunity Commission (EEOC) Regulation, 29 C.F.R. § 1604.11(e) (A-21-22), holding that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment, but failed to take reasonable steps to end it. *Martin v. Howard University,* 1999 U.S. Dist. LEXIS 19516 (A-17). No court has indicated that any particular procedure for reporting harassment by

a non-employee will -- or will not -- qualify as "protected activity" under Title VII.

Complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. It would be futile and illogical to file a formal sexual harassment complaint against a *non-employee*, with the EEO office of an employer that has no means by which to discipline the *non-employee*. The first step in taking "reasonable measures" to end workplace harassment by a *non-employee* is to ban the *non-employee* from the workplace. Prof. Martin reasonably entitled her memos "Security Problem on Campus"[9] because Harrison needed to be prevented from entering the law school buildings and particularly, her office.

III. The Court and the Public would Benefit from Consideration of the Arguments Made by NOW, NAWL and other Advocates for Women and Victims of Crime

The *National Organization for Women* (NOW), the *National Association of Women Lawyers* (NAWL) and the additional *Amici* stressed the national importance of protecting stalking victims against employer retaliation. These potential *Amici* filed a *Motion to Late File an Amicus Brief*, including the jointly filed *Amicus Brief*. NOW is the pre-eminent collective voice of, and advocate for, women in this country. NAWL speaks on behalf of women lawyers. Additional *Amici* speak for victims of domestic and/or workplace violence.

The *Amici* motion to late file was denied, so the Court did not consider the arguments made in

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[9]She *did* initially refer to Harrison's conduct as "sexual harassment." Bruner deposition at 137:4-13 (**JA**6,808).

their Brief; however, if rehearing is granted, the *Amici* will have an opportunity to resubmit these arguments in a Brief on the merits. In the interests of justice and of the people they represent, their voices should be heard in this case.

IV. Stalking in the Workplace is an Issue of National Importance

The issues raised in *Martin* are of national importance. It is particularly appropriate that this Court considers this *Petition* in January, which is *National Stalking Awareness Month. See* www.stalkingawarenessmonth.org, published by the *National Stalking Resource Center*. Stalking in the workplace is an issue of transcendental importance to women. Seventy-eight (78%) of stalking victims are women and 87% of stalkers are men.[10] Eight percent of all women in this country are stalked.[11] 54% of female murder victims reported their stalkers to the police before they were killed by their stalkers.[12] Stalking victims may be rendered unemployable, or under-employed, due to physical injury, mental/emotional injury, or simply due to employer retaliation against stalking victims.

This Court has never addressed the issue of workplace stalking, *per se*; however, Justice Ginsberg characterized Title VII as "a statute that's meant to govern the workplace with all its realities." Tr. Oral Argument in *Crawford*, at 39. Workplace

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[10] "Stalking in America: Findings from the National Violence Against Women Survey" (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1998), 2, http://www.ncjrs.gov/pdffiles/169592.pdf.

[11] *Id.*

[12] The Stalking Resource Center, "Stalking Fact Sheet," www.ncvc.org/src.

stalking is a terrible reality for many women – and one that Title VII should address.

Despite the horrific consequences of stalking, there is no federal statute that *specifically* prohibits employers from retaliating against stalking victims; however, the long-established disparate impact theory holds that an sex discrimination is established where a practice disproportionately adversely affects members of one sex. *See Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements) and *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (offensive conduct affected "*primarily* one sex).[13] The D.C. Circuit never even acknowledged the disparate impact arguments made by both Ms. Martin and *Amicus* NAWL – even though Judge Hogan acknowledged Ms. Martin's adverse impact argument in his 1999 decision. 1999 U.S. Dist. LEXIS 19516 at *10 (A-27).

Martin presents the classic example of stalking based on gender. The stalker targeted his victims based on the *profile* of fictional *female* character in a book. This "gender profiling" and his gender specific desire to make each stalking victim his "wife" necessarily required that he stalk *only women*. Pursuant to *Oncale*, where only members of one sex are subjected to a particular type of harassment, it is based on gender.[14]

Any woman may be stalked by an obsessed workplace stranger, while doing nothing more than "working while female." If *Martin* is not reversed, she will then be forced to choose between her job and

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[13] Pet. at 11-12, 23.

[14] The relationship of a husband and a wife is expected to include sex. Harrison's pursuit of Prof. Martin to be his "wife," was therefore also necessary "sexual in nature."

her safety. Women are reluctant to report sexual harassment, primarily for fear of losing their jobs. See *Amicus* Brief of the *National Women's Law Center, et al*, in *Crawford*, 4-25. If stalking victims are not protected from retaliation, they will be less likely to report the stalking to their employers. This failure to reporting stalking will hinder the employer's ability to secure the workplace and protect the stalking victim or other employees.

Martin now sets precedent holding that a woman can be stalked in her workplace and fired for reporting it. This Court has the power to reverse that holding and set precedent that furthers the Title VII purpose of eliminating sexual harassment in the workplace -- whether the harasser is an employee or a non-employee workplace stalker. This Court's reversal would serve the interests of justice, public safety and workplace equality.

CONCLUSION

Petitioner respectfully requests that that this Court grant Petitioner rehearing, considering this case consistently with *Crawford*.

Respectfully submitted,

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